In The

Supreme Court of the United States

October Term, 1993

Department of Taxation and Finance of the State of New York, *et al.*,

Petitioners,

v.

Milhelm Attea & Bros., Inc., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of New York

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BRIEF OF SENECA NATION OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF SENECA NATION OF INDIANS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS *

The Seneca Nation of Indians is a federally recognized sovereign Indian Nation located within New York State. It is one of the Six Nations that comprise the Iroquois Confederacy. The tax scheme under consideration in this case imposes a quota on the number of cigarettes available for sale to all Indians located in New York State and subjects the Nations and Indian retailers to State licensing and regulation. The Seneca Nation urges that this system imposes substantial burdens inconsistent with the sovereign status of Indians and controlling federal law.

Moreover, the Seneca Nation believes that promises made to it in treaties with the federal government, which are incorporated into federal law, prohibit the State from this assertion of regulatory jurisdiction. Unlike other Indian tribes which this Court has recognized are properly subject to some, although limited, state authority, the Seneca Nation was never conquered nor removed from its land. In its treaties with the United States it has never ceded its jurisdiction nor its authority over the lands it now occupies.

INTRODUCTION AND SUMMARY OF ARGUMENT

By regulation, and in order to assist in the collection of state taxes on reservation sales to non-Indian customers, New York has imposed a quota on the number of tax-free cigarettes that may be supplied to Indian retailers for resale to Indians on their own reservation. This quota system is invalid for two reasons. First, the regulations violate longstanding principles of Indian sovereignty. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). The regulations are also preempted by the federal

* The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

Indian trader statutes, which reserve to the Commissioner of Indian Affairs the "sole power and authority" to "specify[] the kind and quantity of goods" to be sold to the Indians and "to appoint traders to the Indian tribes[.]" 25 U.S.C. §§ 261-264 (1988). By regulating the "kind" and "quantity" of cigarettes sold to Indian customers, the State imposes, as the court below recognized, a "significant" burden on Indians. 599 N.Y.S. 2d 510, 514 (N.Y. 1993).

Second, the tax itself is invalid as applied to all reservation sales because of special treaties and statutory provisions applicable to the Seneca Nation and the other members of the Iroquois Confederacy. The Seneca Nation entered into unique treaties that explicitly acknowledged their sovereignty and their freedom from state taxation. Thus, although this Court has approved the imposition of certain taxes on sales by Indians to non-Indians, *see, e.g., Colville,* 447 U.S. at 159, those precedents are inapposite here.

ARGUMENT

I. THE NEW YORK REGULATIONS ARE INVALID BECAUSE THEY RESTRICT THE "KIND" AND "QUANTITY" OF CIGARETTES DESTINED FOR INDIAN CONSUMPTION

A. The Federal Indian Trader Statutes, The Indian Commerce Clause, And Federal Policy Are Broadly Preemptive Of State Efforts To Regulate Indian Affairs

The State urges that, unless barred by the special treaties and statutory provisions applicable to the Six Nations of the Iroquois Confederacy,[1] *see* Part II *infra,* it has the power to compel non-Indian wholesalers to collect a tax from Indian retailers on cigarettes destined for

[1] The Confederacy includes the following six federally recognized Nations: Seneca, Mohawk, Onondaga, Oneida, Cayuga, and Tuscarora.

sale to non-Indians.[2] Respondents in this case urge that the federal Indian trader statutes broadly preempt the New York regulations. Amicus Curiae the Seneca Nation agrees, but for reasons distinct from those urged by Respondents.

The Seneca Nation maintains that the regulations in question do far more than regulate sales to non-Indian customers, as is apparent from their face, and as Petitioners themselves concede. Pet'rs Br. at 13. As an integral part of its regulatory scheme, the State restricts sales destined for Indian consumption. The Seneca Nation believes that the states have no possible interest or jurisdiction to restrict sales by non-Indian wholesalers to Indian tribes or Indian retailers when the goods involved are destined for sale to Indian customers. The regulations in question restrict such sales to Indian consumers in violation of the Indian trader statutes, the Indian Commerce Clause, and longstanding federal policy favoring Indian self-government in Indian country.

The Court has long recognized that tribal sovereignty sharply limits state jurisdiction where Indians are concerned. Indeed, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson,* 324 U.S. 786, 789 (1945) (quoted in *McClanahan v. Arizona State Tax Comm'n* 411 U.S. 164, 172-73 (1973)). For this reason, "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply." *McClanahan,* 411 U.S. at 170-71; (internal quotation omitted); *see also Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685, 687 n.3 (1965) (noting that state laws apply only where specifically authorized or where "they clearly do not interfere with federal policies concerning the reservations").

[2] This cigarette tax of 56 cents per pack, 1993 N.Y. Laws, Ch. 57, § 53, is in addition to the New York state sales tax of 4%, and any county or local sales tax of up to 4% that may be imposed on top of the state sales tax. N.Y. Tax Law §§ 1105 & 1201 (Mc-

Federal law also restricts state authority. There are "two 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law or it may interfere with the tribe's ability to exercise its sovereign functions." *Ramah Navajo Sch. Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 837 (1982). These twin barriers together form a species of preemption in which the usual presumption—that a state law is not preempted—is reversed. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989). Where Indian tribes are concerned, the rule is that state laws are preempted, in the absence of clear federal approval. *McClanahan*, 411 U.S. at 170-71.[3]

These restrictions apply in the area of state taxation. As this Court stated just last Term, "[a]bsent explicit congressional direction to the contrary, we presume against a State's having jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities." *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1993 (1993).[4] Thus,

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Kinney 1987 & Supp. 1993). The sales tax is not subject to the precollection mechanism and is not involved in this case.

[3] The Court has consistently applied this federal policy to prevent state regulation of Indian affairs in Indian country. *E.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states"); *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976); *McClanahan*, 411 U.S. at 172 (federal policy of advancing Indian sovereignty serves as a "backdrop" against which preemption analysis is informed); Felix S. Cohen, *Handbook of Federal Indian Law* 273 (1982) ("For this reason broad preemption of state laws in Indian country has been consistently recognized as a necessary implication from the federal policy protecting tribal sovereignty").

[4] *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or

"[a]lthough exemptions from tax laws should, as a general rule, be clearly expressed, the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members working and living on land set aside for those members." *Id.* at 1991 (internal quotation and citation omitted).

The state tax immunity of Indians is well established. States are precluded from imposing taxes on Indians and their activities on the reservation. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). *See also* Felix S. Cohen, *Handbook of Federal Indian Law* 259-70 & n.1 (1982) ("Cohen (1982)"). For example, the Court's modern cases establish beyond question that a state generally may not impose taxes on the income, *McClanahan*, 411 U.S. at 165, 181, or the real property, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973), or the personal property, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 163 (1980), of Tribes or tribal members.

This general rule favoring Indian sovereignty applies with particular force in cases, such as this one, involving the sale of goods by non-Indians for Indian consumption, for this trade is subject to comprehensive federal regulation designed specifically to protect Indians. *Warren Trading Post*, 380 U.S. at 691. In the Indian trader statutes, 25 U.S.C. §§ 261-264 (1988), Congress vested in the Federal Commissioner of Indian Affairs "sole power and authority" for regulating all aspects of trade with Indians, including "the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. § 261.[5]

Indian income from activities carried on within the boundaries of the reservation").

[5] 25 U.S.C. § 261 provides in full:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and

In addition, Congress has vested in the Commissioner exclusive authority "to appoint traders." *Id.* Once the Commissioner has determined that a person may "engage in such trade," the Commissioner is left to prescribe "the rules and regulations, if any, under which such trading may take place." 25 U.S.C. § 262.[6] The Commissioner, as regulations enacted under the statute make clear, is authorized to exclude anyone from trading with the Indians and to prescribe the kinds of items that may be sold to Indians and the terms on which they may be sold. 25 C.F.R. §§ 140.1-140.26 (1993). Indeed, the more than 100 currently valid licenses on file in the Syracuse, New York Area Office of the Bureau of Indian Affairs are quite detailed and limit the licensee to trading in particular products.

This comprehensive statutory scheme authorizing regulation of the "kind" and "quantity" of goods "sold to the Indians" was passed in 1876 and traces back directly to earlier comprehensive enactments. *Warren Trading Post*, 380 U.S. at 689. In *Warren Trading Post*, Justice Black noted that the extensive federal control of trade destined for Indian consumption began with a federal statute "passed in 1790 by the first Congress 'to regulate trade and intercourse with the Indian tribes,'" which required federal licenses for Indian traders and specified "in detail the conditions on which such licenses would be granted." *Id.* at 688-89. Justice Black acknowledged that the "comprehensive federal regulation has continued from that day to this." *Id.*

More recently, the Court has noted that "[t]he Indian trader statutes . . . incorporate a congressional desire

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proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

[6] 25 U.S.C. § 262 provides in full:

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange." *Colville*, 447 U.S. at 155. In order to achieve its goal of protecting Indian consumers, Congress intended to permit "no burden [to] be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts." *Warren Trading Post*, 380 U.S. at 691.

That the preemptive force of the Indian trader statutes is particularly potent where sales for Indian consumption are involved is plainly demonstrated by prior decisions of this Court. At issue in *Warren Trading Post*, for example, was a two percent gross receipts tax levied on a federally licensed Indian trader selling to Indians on the Navajo Indian Reservation. 380 U.S. at 685-86. The Court invalidated the tax, noting that it might have disturbed "the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.* at 691. A tax on income derived from sales to reservation Indians, notwithstanding its incidental impact on Indian consumers, could not be regarded as specifically authorized by Acts of Congress, nor as "clearly . . . not interfer[ing] with federal policies concerning the reservations." *Id.* at 686-87 & n.3. In all events, as the Court concluded, "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations *so fully in hand that no room remains for state laws imposing additional burdens upon traders.*" *Id.* at 690 (emphasis added).

The preemptive force of the Indian trader statutes is so strong that this Court has held that Arizona cannot impose a tax on the sale of farm machinery to an Indian, even where the seller is not licensed as an Indian trader. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). "It is the existence of the Indian trader statutes," wrote the Court, "and not their administration, that pre-empts the field of transac-

tions with Indians occurring on Indian reservations." *Id.* at 165.

In short, nothing in the Indian trader statutes authorizes New York to restrict sales from off-reservation wholesalers destined for Indian consumption. To the contrary, the Court's cases construing the statutes and related administrative regulations confirm that the federal government exercises plenary control over the "kind," "quantity" and "price" of goods destined for Indian consumption. Congress has not allowed for the application of state laws that would subject tribal Indians to comprehensive state control in these areas.

B. The New York Regulations Restrict And Substantially Burden Sales For Indian Consumption

It is against these preemptive statutes and "the 'backdrop' of Indian sovereignty" that the New York scheme of taxing cigarette sales on Indian reservations, and the burdens that scheme imposes, must be assessed. *Moe v. Confederated Salish and Kootenai of the Flathead Reservation*, 425 U.S. 463, 475-76 (1976). Tellingly, Petitioners acknowledge that "the focus and principal burden" of compliance with its comprehensive "regulatory scheme lies with and falls upon the Indian nation or tribe and the reservation retailer" (Pet'rs Br. at 13), a burden the court below aptly described as *"significant."* 599 N.Y.S.2d at 514 (emphasis in original).

Unlike taxes permitted by this Court in *Moe* and its progeny, *see infra* at 13-18, the New York scheme does not involve the "simple expedient" of a mechanism for collecting the cigarette tax from non-Indian consumers. Rather, it requires extensive state involvement and control in the form of licensing and approval before cigarettes may be purchased for resale to Indians. More significantly, the New York scheme directly imposes a quota on the number of cigarettes that may be sold for Indian consumption.

The New York tax operates as follows. As to cigarettes upon which the retailers have prepaid the tax and

which therefore bear state tax stamps, Indian retailers may purchase an unlimited amount. These "stamped" cigarettes are destined for sale on the reservation to non-Indians. With respect to untaxed cigarettes, which bear no tax stamps, that is, those destined for sale to Indians, New York limits the amount that may be purchased. That amount is determined under a formula prescribed by regulation. The formula, intended to reflect "probable demand," may be derived from evidence a Tribe may submit,[7] or by the State calculating "such demand based upon the New York average consumption per capita . . . multiplied by the number of enrolled members of the affected nation or tribe (or . . . by the reservation service area population . . .)." 20 N.Y.C.R.R. § 335.7(d)(2)(ii). These cigarettes may be sold by the wholesaler only to a "registered dealer," that is, a dealer "registered" by the State, who must meet several State requirements. *Id.* § 335.6(f).

These regulations plainly interfere with the exclusive federal control in this area—as well as with Indian sovereignty—in three fundamental ways.

First, New York imposes additional requirements as well as a State approval process on federally-protected Indian retailers. Under the New York scheme, only those Indian Tribes and Indian retailers registered with and licensed by the State may receive unstamped cigarettes for resale to Indians on Indian reservations. 20 N.Y.C.R.R. § 335.6(b)(4), (f)(i)-(iii)(b)(2).[8] An Indian retailer may be denied a certificate of registration permitting sales to Indians for several reasons, including

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[7] This evidence may include "records of previous sales to qualified Indian consumers, records relating to the average consumption of qualified Indian consumers on and near its reservation, tribal enrollment, or other statistical evidence." 20 N.Y.C.R.R. § 355.7(d)(2)(i).

[8] In order to avoid confusion, *Amicus* will join the parties in citing the regulations as numbered at the time this case was filed. *See* Pet'rs Br. at 3 n.3. The regulations are reproduced in the appendix to Petitioners' brief.

that the retailer has outstanding tax liability of any kind; that the retailer is not already licensed to collect state taxes (which requires payment of $1,500 and the posting of a $1,000 bond, 20 N.Y.C.R.R. § 331.1(5)(b)), or that the retailer does not submit evidence of compliance with applicable tribal regulations. *Id.* § 335.6(f)(iii)(a). Even if they meet the prescribed requirements, Indian retailers are not ensured of receiving a license under the regulations.[9]

Second, New York taxes sales to Indians of cigarettes that will be consumed off of the reservation. Under the regulations, Indians are excused from payment of tax on cigarettes purchased on the reservation only if the cigarettes are to be consumed on the reservation. 20 N.Y.C.R.R. § 335.6(e). Indeed, under New York law, possession of unstamped cigarettes off the reservation may give rise to stiff civil and criminal penalties. *See* N.Y. Tax Law § 1814(h) (McKinney Supp. 1993). But this conflicts directly with the right of individual Indian consumers to purchase cigarettes free from state tax. *See Moe*, 425 U.S. at 480-81 (invalidating personal property tax); *Colville*, 447 U.S. at 163 (striking down state excise taxes on motor vehicles used partly on and partly off the reservation).

Finally, and perhaps most offensive to the federal statutory scheme, is that New York has created a system under which it imposes a quota on the sale of cigarettes

[9] The regulations provide that "[u]pon application, the Department . . . *may* register an applicant and issue a certificate . . . if the applicant" satisfies the requirements. *Id.* § 335.6(f) (emphasis added). The dealer is also required to retain records of each purchase for three years. N.Y. Tax Law § 474(4) (McKinney 1987); 20 N.Y.C.R.R. § 335.5. Violation of these provisions exposes a dealer to sanctions ranging from loss of certificate of registration (N.Y. Tax Law § 480(1) (McKinney Supp. 1993)), to civil penalties (*e.g.*, N.Y. Tax Law §§ 480-a(3), 481(1)(a)(i), 481(1)(b)), to interest (*Id.* § 481(1)(a)(ii)), to criminal liability (*Id.* §481(4) (McKinney 1987 & Supp. 1993)). Finally, a delinquent dealer may forfeit any real property necessary to satisfy the tax liability. N.Y. Tax Law § 479 (McKinney 1987).

to Indian consumers on Indian reservations. 20 N.Y.C.R.R. § 335.7. Pursuant to this regulation, the Commissioner must determine the total number of cigarettes that may be sold on the reservation for consumption by Indians. *Id.* § 335.7(d). The Commissioner arrives at that number by multiplying the number of enrolled reservation Indians (or, if such membership numbers are not available, the reservation service area population) by the New York average per capita consumption of cigarettes. *Id.* In the alternative, the Tribe may provide the Commissioner with "evidence," *id.* § 335.7(d)(2)(i), from which the Commissioner establishes the quota.

But Congress has expressly declared that determinations as to the quantity of goods that may be sold to Indians in Indian country rest solely with the federal government. *See* 25 U.S.C. § 261. That explicit limitation on state authority is particularly compelling here. New York's quota system, like any system of rationing, would wreak havoc on the chain of distribution and create substantial burdens on Indian purchasers unless there is complete accuracy in the estimation of the number and the brand of cigarettes sought. There is no basis for assuming that New York has the ability accurately to guess overall Indian demand. The New York calculation looks to the number of "enrolled" Indians. There are some 6,400 enrolled Seneca Indians,[10] and we estimate that there are an additional 25,000 Indians enrolled in other Tribes throughout the State. These estimates may be low in view of the 1990 U.S. Census estimate that there are 60,855 Indians throughout New York State.[11]

[10] Official Role, Seneca Nation (1993).

[11] Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population, General Population Characteristics, New York*, Table 3 (1990 CP-1-34), at 45. Even that number probably seriously under-counts the actual Indian population, as Indians are reluctant to respond to census questionnaires. Barbara Vobejda, *More Americans Declaring Indian Identity; Shifting Self-Image Seen Behind 80-Year Tripling in Census Numbers*, THE WASHINGTON POST, Feb. 11, 1991, at A1.

The New York quota then requires a determination of cigarette consumption. Neither figures for the average consumption by members of the Six Nations nor for New York State generally are available. Americans consumed 2,576 cigarettes per person in 1993.[12] Whether that figure is representative of smokers in New York, or of smokers who are Indians, is unknown.

Even if the State could predict *aggregate* Indian cigarette consumption with any degree of accuracy, the realities of the marketplace make clear that this system is unsound in theory and unworkable in practice. Indian consumers will be restricted in obtaining the kind and quantity of the cigarette brands of their choosing because the market structure precludes the possibility of distribution in precise proportion to demand.

American cigarette smokers exhibit strong brand preferences, choosing from 59 brands, excluding generics (*i.e.*, non-brand), and several hundred "brand extensions."[13] New York's formula makes no accommodation for brand preferences, addressing only the number of cigarettes that may be distributed to retailers for tax-free purchase. Compounding the difficulty, cigarettes are sold in New York on 10 separate reservations, through some 100 retail smokeshops. Those 100 retailers do business with more than 75 cigarette wholesalers.[14] Because of intense price competition, the relationship between wholesalers and retailers is constantly changing. Indeed, at any given time a single retailer may be dealing with several wholesalers. The number of wholesalers and retailers, and the

[12] United States Dep't of Agriculture, *Tobacco Situation and Outlook Yearbook*, 5 (Sept. 1993).

[13] A "brand extension" is a variation of a brand offering; RJR Nabisco offers, for example, "Camel" cigarettes with and without filters. The Maxwell Consumer Report, *1991 Year-End Sales Estimates For The Cigarette Industry* (1993) (listing sales figures for each brand and brand extension).

[14] *See* Records of Bureau of Indian Affairs, Syracuse, N.Y. Area Office.

fluid relationships that exist among them, will inexorably lead to a burden on Indian purchasers.

As a result, Indians will inevitably encounter retailers who do not carry their brands at all or who have sold out their supply of tax-free cigarettes. Indians may thus be forced to pay the cigarette tax[15] or travel, perhaps a considerable distance, to another smokeshop that may have exempt cigarettes in the sought-after brands, or to forego the purchase altogether. Wholesalers and retailers alike, faced with extensive administrative requirements, may raise prices or simply refuse to carry cigarettes earmarked by the State for Indian consumption.

In sum, the New York regulatory scheme, as the court below correctly observed, places "significant" burdens on both Indian traders and Indians. Unlike the "simple collection requirements" considered in *Moe, Colville*, and *Potawatomi, infra*, at 13-18, this scheme impermissibly burdens and regulates trade destined for Indian consumption, imposes a quota on Indian purchases from Indian traders, and subjects Indian Tribes and Indian retailers to comprehensive, unauthorized state regulation. While New York may have some pecuniary interest in regulating Indian trade, notwithstanding the extensive federal involvement in the area, it has no legal interest at all in restricting sales for Indian consumption. "Until Congress repeals or amends the Indian trader statutes . . . [the Court] must give them 'a sweep as broad as their language.'" *Central Machinery*, 448 U.S. at 166 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

C. This Court's Decisions In *Moe, Colville* And *Potawatomi* Cannot Save The Regulations

Recent cases upholding state taxation of on-reservation cigarette sales by Indians to non-Indians, do not, contrary to Petitioners' assertion (Pet'rs Br. at 14-19), au-

[15] That some refund mechanism may be available. Aff. of William F. Collins, Record on App. at 146-47, is unavailing given its likely burdensome and cumbersome nature.

thorize states to restrict sales to Indians in aid of their efforts to collect a tax on cigarettes from non-Indians. Those cases arise against a backdrop of repeated decisions of this Court that caution against a broad reading of state authority on Indian reservations even where commercial transactions with non-Indians are involved. *See, e.g., New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *Ramah Navajo Sch. Bd.,* 458 U.S. at 837. At most, this Court's cigarette cases acknowledge that those particular states may impose cigarette taxes on non-Indian retail customers, where doing so results in only a minimal collection burden on the part of Indian retailers.

For example, in *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976), Montana sought to assess a license fee on a vendor selling cigarettes on the reservation, and to impose a tax on sales of cigarettes on the reservation to Indians and non-Indians alike. With respect to the sale of cigarettes by Indians to *non-Indians,* the Court held that the Indian retailer could be required, as "a simple expedient," to collect and remit the state's sales tax. *Id.* at 481-83.[17] The Court approved the collection requirement because it was no more than a "minimal burden" and was not "strictly speaking, a tax at all" to which the rule of presumed invalidity would apply. *Id.* at 483

[16] *Oklahoma Tax Comm'n v. Citizen Band Potamatomi Indian Tribe of Okla.,* 498 U.S. 505 (1991); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976).

[17] "We therefore agree . . . that to the extent that the 'smoke shops' sell to those upon whom the state has validly imposed a sales or excise tax with respect to the article sold, the State may reqire the Indian proprietor *simply to add the tax to the sales price* and thereby aid the State's collection . . . ." *Id.* at 483. Indian customers were largely unaffected because the incidence of the tax fell on only non-Indian customers. *Id.* at 481-82. The importance of this distinction has been underscored since. *E.g., California State Bd. of Equalization v. Chemehuevi Indian Tribe,* 474 U.S. 9, 12 (1985) (per curiam).

(citing *Mescalero Apache Tribe v. Jones,* 411 U.S. at 148). The Court expressed no opinion, however, with respect to the "complicated problems of enforcement" stemming from the limited collection burden. *Id.* at 468 n.6. At the same time, the Court, relying on Indian sovereignty, held that Montana had no authority to exact a vendor license fee from a reservation Indian conducting a cigarette business for the Tribe on reservation land, or to impose a sales tax on the sale of cigarettes by Indians to Indians. *Id.* at 475-81.

The Court returned to the question of state taxation of retail sales of cigarettes to non-Indians in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980). When considering the " 'complicated problems' of enforcement that distinctions between exempt and nonexempt sales might entail," the Court noted that the statute's "simple collection burden" imposed no more than a minimal responsibility to "affix tax stamps purchased from the State to individual packages of cigarettes prior to the time of sales to nonmembers of the Tribe."[18] 447 U.S. at 159 (quotation omitted).[19] Washington required an Indian purchaser who was not already known to the retailer to present tribal identification and also required the retailer to record taxable and non-taxable transactions. These were not, on the record before the Court, considered an undue burden on Indian retailers. *Id.* at 160. The taxing mechanism did not operate to restrict sales destined for Indian consumption, and nothing in the Court's opinion could be read to authorize such regulation.

[18] The Court also considered and rejected an excise tax the State sought to impose on Indian vehicles operated on and off of the reservation. *Id.* at 163 ("While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accompish what *Moe* held was prohibited.").

[19] Unlike the present case, there was no requirement in *Colville* that the Indian retailers purchase only cigarettes already stamped and for which the tax had been pre-collected or cigarettes pre-approved by the State for sale to Indians. 447 U.S. at 141.

The Court's most recent decision in this area, *Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 506 (1991), reaffirms the primacy of tribal sovereignty. In that case, Oklahoma sought to enforce a tax on the sale of cigarettes to Indians and non-Indians and sought to obtain judgment against the Tribe for unpaid taxes. The Tribe claimed immunity from both the suit and the sales tax by virtue of tribal sovereignty. In upholding the Tribe's claim to immunity, the Court rejected Oklahoma's invitation to abandon the longstanding tribal sovereignty doctrine and the presumption of invalidity of state taxation on Indian lands. This rejection made particular sense in light of apparent congressional approval of the view of Indians as "domestic dependent nations" entitled to sovereign immunity. *Id.* at 509-10.

However, although a Tribe cannot be sued for non-collection, tribal sovereignty "does not excuse a tribe from all obligations to assist in the collection of validity imposed state sales taxes," so long as collection constitutes only "a minimal burden." 498 U.S. at 512. The Court noted that tribal sovereign immunity does not leave the State without any remedy in the event that Indians fail to collect taxes from their non-Indian customers:

> We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville* [447 U.S.] at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990).

498 U.S. at 514. Compliance with the collection requirement, as the Court noted, could be more efficiently assured through negotiation with the Tribes or by seeking "appropriate legislation from Congress." *Id.*

Petitioners here point to *Potawatomi*'s discussion of potential remedial measures and conclude that it, together with *Moe* and *Colville*, somehow authorizes any state regulation designed "to prevent avoidance of tax by non-Indian purchasers." Pet'rs Br. at 14. But *Potawatomi* neither implicitly overrules this Court's long and unbroken line of decisions concerning the extensive federal role in the regulation of Indian trading, nor does it create plenary state jurisdiction over Indian trade. Rather, it merely addressed the situation—not present here—in which past due taxes were owing, suggesting that collection from wholesalers might be appropriate and only in that instance.[20] It does not authorize comprehensive regulation of every purchase or sale of cigarettes on Indian reservations. This reading is not "fallacious" (Pet'rs Br. at 19) —it is the only reading consistent with the context of the case and this Court's longstanding Indian jurisprudence. In any event, *Potawatomi* does not authorize restrictions on Indian purchasers as a method of enforcing the collection obligation with respect to non-Indians.

A careful review of the *Moe*, *Colville* and *Potawatomi* opinions demonstrates that the *only* regulations of sales for Indian consumption that were sustained were the simple requirements, consistent with principles of comity among sovereigns, that Indians identify themselves at the

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[20] That *Potawatomi* concerns the limited situation of remedying past collection violations may be seen through the Court's agreement with the United States' brief in that case:

> However, there are measures available to the Commission to ensure collection of the tax in the future. . . . [I]f the Tribe continues to sell unstamped cigarettes, the Commission could assess the unpaid taxes against wholesalers that supply such cigarettes to the Tribe, as it has done before. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (10th Cir. 1990). . . . [T]he Commission could seize and forfeit unstamped cigarettes . . . enroute to the tribal store. *See Colville*, 447 U.S. at 161-162.

Br. of United States at 18-19 n.17, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 506 (1991) (No. 1322) (citations omitted).

point of purchase and that the retailer keep records of such sales. *Colville,* 447 U.S. at 160. In all other instances, this Court has invalidated State taxes that fall on or burden Indians, including statutes imposing taxes on Indian property and sales to Indians, and a license fee imposed upon retailers selling to Indian consumers. So too in other contexts this Court has invalidated state regulations directed solely to non-Indian activities where the burden of the regulation would impair or preclude Indian activities or Indian self-governance. *See New Mexico v. Mescalero Apache Tribe,* 462 U.S. at 338-41; *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987). Nothing in *Moe, Colville,* or *Potawatomi* authorizes the imposition of anything more than a minimal burden on Indian retailers selling cigarettes to non-Indians in those particular states. Nothing in those decisions supports New York's unparalleled assertion of state power to restrict the sale of goods of any kind to Indian consumers in Indian country.

II. BECAUSE OF THE SPECIAL STATUS OF THE SENECA NATION OF INDIANS AND THE OTHER FIVE NATIONS OF THE IROQUOIS CONFEDERACY, THE REGULATIONS ARE ALSO INVALID INSOFAR AS THEY SEEK TO TAX SALES ON RESERVATION LANDS

Petitioners in this case urge that their interest in taxing sales to non-Indians justifies their assumption of authority over and concomitant restrictions on Indian trade. The Seneca Nation maintains, however, that the plain language of treaties and federal statutes pertaining solely to it and the other member tribes of the Six Nations prohibit application of all New York taxes on activities occurring on reservation lands absent congressional approval. Therefore, the Six Nations, unlike other Indians, claim protection not only under the federal policy favoring tribal sovereignty applicable to Indians generally, but, more specifically, also under treaties that would have reasonably been understood by them as leaving no room for the application of state taxes.

In this case, amicus urged below that the treaties governing the relations between the Six Nations and the United States and implementing federal legislation preclude taxation of on-reservation sales (although the court did not reach the question). However, this point was not urged by the Respondents. To the contrary, they urged there, as they do here, that the solution for New York is to impose the tax on the Indian retailer, an approach we believe to be wholly improper and contrary to both the treaties and to 25 U.S.C. § 233 (1988).[21]

As we have discussed, this Court's decisions in *Moe, Colville,* and *Potawatomi,* recognized that the states of Montana, Washington and Oklahoma, consistent with the treaties and federal enactments controlling in those states, could validly impose a tax on the sale of cigarettes to non-Indians in Indian country. Looking carefully to the applicable treaties and federal statutes and "[r]eading them against the 'backdrop' of the Indian sovereignty doctrine," the Court concluded that with respect to those tribes the taxes did not frustrate their rights to self-governance, nor did they frustrate the federal statutory scheme. *E.g., Moe,* 425 U.S. at 475, 483 (quoting *McClanahan,* 411 U.S. at 172). However, the Tribes of the Six Nations, unlike their western counterparts, have never surrendered their sovereignty and have been specifically preserved in their sovereign status, exempt from state tax laws, by treaties and statutes applicable only to them.[22] Accordingly, the present regulations cannot

[21] Whether the regulations at issue here are authorized by New York law is an unresolved question currently pending before the New York Court of Appeals. *See Snyder v. Wetzler,* No. 67506 (N.Y. App. Div. Nov. 10, 1993).

[22] The Indian tribes at issue in *Moe, Colville,* and *Potawatomi* had surrendered their sovereignty and were wholly dependent on federal protection from state encroachment. The treaty considered in *Moe,* for example, provided that the "Flathead Nation[would] cede, relinquish and convey to the United States all their right, title, and interest in and to the country occupied by them." Treaty with the Flatheads, July 16, 1855, U.S.-Flathead Nation, 12 Stat. 975. The treaties considered in *Colville* all likewise ceded the re-

validly be applied to the Tribes of the Six Nations.[23]

A. New York State Cannot Impose Taxes On Reservation Activities Because The Six Nations Uniquely Retained Their Sovereign Status

Since the early days of the Republic, this Court has viewed Indian tribes as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Most tribes maintain this sovereign status as a matter of federal policy in the present day. *See Potawatomi*, 498 U.S. at 510. However, because most Indians "through conquest or treaty were induced to give up complete independence" on their lands in exchange for federal protection, *Williams v. Lee*, 358 U.S. 217, 218 (1959), this Court concluded that those lands are not automatically exempt from operation of all state laws. *See Potawatomi*, 498 U.S. at 512. However, unlike the Potawatomis and most other Indians, the Senecas were never removed or relocated, and the lands they occupy are aboriginal. Nor did they surrender by treaty their sovereign status. As a result, activities occurring on Seneca lands remain exempt from operation of state regulatory law.

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spective Tribes' rights in exchange for federal protection. Treaty of Point Elliot, Jan. 22, 1855, U.S.-Dwamish and Suquamish Indians, 12 Stat. 927; Treaty with the Makah Tribe, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939; Treaty with the Yakamas, June 9, 1855, U.S.-Yakama Nation, 12 Stat. 951. The land at issue in *Potawatomi* was conveyed by a quit claim deed providing that "these tracts are not exempt from taxation . . . because of Indian ownership." Act of Sept. 13, 1960, Pub. L. 86-761, 74 Stat. 903. The Indians in these tribes nonetheless retained some sovereignty by virtue of federal policy and statutes addressing Indians in general.

[23] This would not preclude New York from imposing a use tax on the off-reservation consumption of cigarettes by non-Indians.

1. *The Six Nations Were Never Conquered And Therefore Did Not Relinquish Their Sovereign Status*

Owing to their relatively early contact with European settlers, the Six Nations became important allies for the competing European governments who laid claims to various parts of what is now the Northeastern United States and Canada. During the American Revolution, a majority of the Tribes of the Six Nations actively waged war in support of the British Crown. Felix S. Cohen, *Handbook of Federal Indian Law* 418 (1972) ("Cohen (1972)"). Even after the 1781 defeat of British forces at Yorktown, Great Britain was still unlawfully in possession of several forts in New York. From that position, the British provoked the Six Nations into hostilities and unrest with the United States—"even providing them with arms with which to resist encroachments upon their land." *Id.* at 419.[24] As a result, the incipient American government was anxious to make peace with the powerful Six Nations of the Iroquois Confederacy. Achieving this peace was so important that George Washington himself made the difficult journey to upstate New York to help the negotiations in 1783. *Id.* at 418.

The Seneca Indians, therefore, did not negotiate treaties from a weakened position, since they had been neither conquered nor forced to surrender their land. As the Court has previously recognized, the six Tribes comprising the Iroquois Confederacy, including the Seneca Nation, were collectively "the most powerful Indian Tribe in the Northeast" at the time they entered into treaties with federal officials. *County of Oneida v. Oneida In-*

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[24] At the instigation of Great Britain, the Senecas and some other members of the Six Nations engaged in these hostilities in Western New York and joined with tribes in the Northwest Territory (which included at that time Ohio and all points to the West) to prevent further U.S. expansion in the Ohio Valley. Cohen (1972), *supra*, at 419. The Senecas were thus viewed as the "Doorkeeper of the West," reflecting their strategic importance to efforts to expand the country westward. *Id.*

dian Nation, 470 U.S. 226, 230 (1985). The "Iroquois Nation of Indians, from the time of the appearance of the first white settlers, continuously asserted their right to certain lands occupied by them." *United States v. City of Salamanca*, 27 F. Supp. 541, 545 (W.D.N.Y. 1939).

2. *The Six Nations Did Not Surrender Sovereignty In Their Treaties With The United States*

Against this backdrop of active Indian sovereignty, the Senecas, the other Nations of the Iroquois Confederacy and the Federal Government executed three treaties shortly after the end of the Revolutionary War. These treaties did not relinquish the sovereign status of the Six Nations. The first, the Fort Stanwix Treaty, Oct. 22, 1784, U.S.-Six Nations, 7 Stat. 15, provided for the release by the Indians of prisoners they had taken during the Revolution and for the establishment of a boundary line, to the west of which the Six Nations yielded their claims. Opp. Cert. App. AA1.[25] In exchange, the Six Nations were promised that "they shall remain secured in their peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of same." 7 Stat. 15, 15-16.

Shortly after the ratification of the Constitution, the Indians and the Federal Government, which feared Iroquois influence in the west, met in Ohio to "renew and confirm all the engagements and stipulations . . . [of the] Treaty at fort Stanwix." Fort Harmar Treaty, Jan. 9, 1789 U.S.-Six Nations, 7 Stat. 33 (Opp. Cert. App. AA4). Again, the Six Nations agreed to relinquish their claims to land west of the established boundary, and, again, the United States agreed, although this time unequivocally so, to "relinquish and quit claim" to all other land to the north and east covered by the agreement. 7 Stat. 34.

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[25] Citations to Opp. Cert. App. may be found in the appendix to our Brief in Opposition to Certiorari.

Several years later, and against a backdrop of wars with Indians in the Northwest Territory that had caused "decided unrest" among the Six Nations, Cohen (1972) at 419, Federal representatives met with the Nations in order to "remove from their minds all causes of complaint." Canandaigua Treaty of Peace, Nov. 11, 1794, U.S.-Six Nations, 7 Stat. 44 (Opp. Cert. App. AA8). In further defining various boundaries between the United States and the Six Nations, the United States in the Canandaigua Treaty promised never to "claim" or "disturb" the "Senekas" nor other members of the Iroquois Confederacy in "the free use or enjoyment" of their property. In return, the Six Nations promised "never [to] claim any other lands within the boundaries of the United States." The Nations also assured the people of the United States free and safe passage through their land. "These treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws." Cohen (1972) at 419. Thus, neither by conquest nor by treaty did the Six Nations relinquish their sovereign authority.

B. The Seneca Nation Entered Into A Treaty Specifically Exempting Indian Reservations From Taxation

The Seneca Nation of Indians, consistent with its sovereign status, successfully negotiated for a specific treaty exemption from state taxation. In 1842, the Senecas, the States of New York and Massachusetts, and the Federal Government executed the Buffalo Creek Compromise Treaty of 1842.[26] U.S.-N.Y.-Mass.-Six Nations, May 20,

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[26] The Buffalo Creek Compromise Treaty of 1842 followed on the heels of the Buffalo Creek Treaty of 1838, Jan. 15, 1838, U.S.-Six Nations, 7 Stat. 550, which had called for relocation of the Senecas and other Six Nation members to the territory west of the Mississippi. The Senecas repudiated that treaty, and it was replaced by the newly-negotiated Buffalo Creek Compromise Territory of 1842.

1842, 7 Stat. 586. That Treaty provided for the Federal Government to "protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from *all taxes*, and assessments for roads, highways or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them." 7 Stat. 590 (emphasis added).

It has been suggested that this Treaty speaks only to land, leaving states free to impose a tax on Indians on anything other than reservation property.[27] This strained interpretation, erroneous in our view, violates the plain language of the Treaty. It also is directly at odds with the principle long recognized by this Court that treaties with Indians should be read as the Indians themselves would have understood them. *See Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 678 (1979); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 177. This approach to treaties with Indians applies with equal force where taxes are in question. Thus, "[w]hile in general tax exemptions are not to be presumed and statutes conferring them are to be strictly construed, the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government." *Carpenter v. Shaw*, 280 U.S. 363, 366 (1930) (citations omitted).

Until 1841, the Seneca Nation was subject to no taxes at all. Thus, a treaty providing them "free use and enjoyment of their land" would have been understood by them as a guarantee that no exactions would be made, either on the land itself or on activities on the land. Given their exemption from all taxes, there was no reason for the Senecas

[27] This argument was raised in *Snyder v. Wetzler*, currently pending before the New York Court of Appeals. The lower court in that case, the Appellate Division, read the Treaty very narrowly to authorize New York to exercise plenary tax jurisdiction over all activities occurring on Indian lands absent congressional prohibition. No. 67506, slip op. at 5, 6 (N.Y. App. Div. Nov. 10, 1993).

to negotiate for an exemption for activities occurring on lands over which they retained complete authority. Hence, the Seneca representatives present at the signing of each of the treaties before 1841 would have understood that no tax of any kind would be applicable in their lands. *See McClanahan*, 411 U.S. at 174[28] (finding exemption from income tax implicit in Navajo treaty despite silence in that respect); *Squire v. Capoeman*, 351 U.S. 1, 10 (1956) (construing treaty exempting Indian land from all "charge or incumbrance" to extend to all income derived directly therefrom). Following the State's 1841 effort for the first time to impose a tax, the Seneca Nation entered into the 1842 Treaty which contains the express prohibition of "all taxes." The Seneca representatives present at the signing of the 1842 Treaty surely would have understood it to confirm an exemption from all taxation. The Treaty language thus is a broad preclusion of taxation, whether on the land directly or on activities occurring on the land.

C. This Court's Decision In *The New York Indians* Case Confirms This Interpretation Of The Treaties

In *The New York Indians* case, 72 U.S. at 769, this Court carefully reviewed the treaties of the Six Nations, holding that the Seneca reservations are to be regarded as "wholly exempt from state taxation." 72 U.S. at 771. The Court's decision in *The New York Indians* has never been questioned nor overruled, and remains as controlling today as it was in 1866.

At issue in *The New York Indians* case was a tax on reservation land for the purpose of making road improvements on that land. New York argued that the tax was permissible because, in the event of a failure to remit the tax, New York would disturb only non-Indians who were on the reservation for nonpayment. The Court struck

[28] "The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to read as an ordinary contract[.]" 411 U.S. at 174.

down the tax, concluding that it was expressly precluded by the treaty, and that "all the treaties from 1784 down to" the Buffalo Creek Compromise Treaty of 1842, 72 U.S. at 769, supported this conclusion. Noting that the Indians remained in "their ancient possession and occupacy" (*id.* at 770), the Court reproached the State: "the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 771. Indeed, in closing, the Court went out of its way to praise New York for its 1857 statute that expressly prohibited taxation of Indian lands. *Id.*[29]

D. Federal Statutes Preserve The Exemption From Taxation Provided By The Treaties

Congress has specifically recognized the unique position of the Six Nations, having enacted special statutes concerning them only. In so doing, Congress has never acted to abrogate Seneca sovereignty. To the contrary, and consistent with its treaty obligations, the Federal Government has permitted New York to exercise only limited jurisdiction over the subjects of the Six Nations. At the same time, Congress has made clear that those limited grants of authority to New York do not include the authority to levy taxes on Indian reservations.

The history of disputes between Federal and State authorities concerning New York's supposed power to regulate the affairs of the Indians within its borders is long and contentious. From the outset, New York has advanced the belief that it enjoys plenary authority over

[29] The New York Statute, 1857 N.Y. Laws Ch. 45; N.Y. Indian Law, § 6 (McKinney 1950) provides:

> [N]o tax shall hereafter be assessed on either of said reservations. . . . for any purpose whatsoever, so long as said reservations remain the property of the Seneca Nation; and all acts of the legislature of this state conflicting with the provisions of this section are hereby repealed.

The legislative history of the 1857 law reveals New York's recognition that the title of the Seneca Nation to its lands is *"original, absolute,* and *exclusive."* New York Senate Doc. No. 28 (1857).

the Six Nations, a belief routinely rejected by the federal government. New York objected to the initial federal effort to negotiate a settlement with the Six Nations; it claimed the right to deal with the Indians separately and hoped entirely to remove them from the State. Gerald Gunther, *Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations*, 8 Buff. L. Rev. 1, 4 (1959).[30] This position was resoundingly rejected by the federal treaties. After the treaties, the State policy regarding its so-called "Indian problem" was first to remove the Indians from the State and, failing that, later to "[e]xterminate the tribe and preserve the individual; make citizens of them and divide their land in severalty." *Id.* (quoting the Whipple Report prepared for the State Assembly in 1888). As the State's policies were in direct contravention of the federal policy favoring tribal self-government, the State was rebuked at each turn by state or federal courts and informed that it lack authority.[31]

More recently, following a decision by the Court of Appeals for the Second Circuit that New York law had no valid application to the Six Nations on their reservations "except so far as the United States has given its consent," *United States v. Forness*, 125 F.2d 928, 932 (2d Cir. 1942), *cert. denied*, 316 U.S. 694 (1942), New York sought explicit authorization from Congress to apply its law to Indians. *See* Report of the Joint Legislative

[30] In fact, the State was so offended by the federal efforts that it even went so far as to arrest several of the federal agents involved with the Indian negotiations. *Id.*

[31] *E.g.*, *The New York Indians*, 72 U.S. at 762; *Tuscarora Nation of Indians v. Power Auth.*, 257 F.2d 885 (2d Cir. 1958), *cert. denied*, 358 U.S. 841 (1958), *vacated as moot*, 362 U.S. 608 (1960) (striking down state effort to unilaterally condemn reservation land and noting "Congress in . . . § 233 pointed up and reaffirmed its paramount authority over tribal lands"); *Buffalo, R. & P. R. Co. v. Lavery*, 27 N.Y.S. 443 (1894), *aff'd*, 43 N.E. 986 (1896) (holding state issued, federally unauthorized leases invalid); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942) (holding that Indian lands are beyond the operation of New York law).

Committee of the New York State Legislature (1945) (recommending that "Congress be asked to enact appropriate legislation for the recognition of New York State authority over the various Indian reservations lying within the state"). Congress acquiesced with respect to criminal jurisdiction by enacting 25 U.S.C. § 232, which extended New York's criminal statutes to crimes committed on Indian reservations.

With respect to civil jurisdiction over disputes involving Indians, however, Congress was manifestly more circumspect, limiting the jurisdiction of "the courts of the State of New York" to "civil actions and proceedings between Indians or between one or more Indians and any other person or persons. . . ." 25 U.S.C. § 233. Even then, Congress took pains to preserve the Six Nations' sovereignty, adding a choice of law proviso which authorized the Nations "to declare . . . those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue." *Id.* Congress also left New York courts free to "recogniz[e] and giv[e] effect to any tribal law or custom which may be proven to the satisfaction of such courts. . . ." *Id.* The section thus permits state courts to exercise jurisdiction over private disputes involving Indians and also to permit Indian law to govern the dispute.[32]

Congress then emphasized that this was a limited grant of judicial jurisdiction, one that did not carry with it any grant of legislative jurisdiction, or include the power to tax. Thus, Section 233 contains an express proviso that

[32] *See, e.g., In re Jimerson*, 255 N.Y.S. 2d 959, 961 (1965) ("The statute is permissive and nothing in its legislative history indicates that it was intended to do more than to open the State courts to Indians, if they should choose to use them."); *cf. Bryan v. Itasca County*, 426 U.S. 373, 377, 385 (1976) (similarly interpreting parallel language in 28 U.S.C. § 1360(a)).

"*nothing herein shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes. . . .*" The Senate Committee report on the law stresses that "State law does not apply to Indians except so far as the United States has given its consent." S. Rep. No. 1836, 81st Cong., 2d Sess. (1950).[33]

The "no taxation" proviso of Section 233 itself precludes application of the cigarette tax to sales conducted on Indian lands. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). By exempting "the lands within any Indian reservation" from all state taxation, the proviso reaches activities, like the sale of cigarettes, conducted on those lands. But even if this proviso is not read as a specific prohibition against on-reservation taxation, New York may exercise over the Senecas only that authority Congress has expressly allowed. Should New York wish to alter this result, its recourse lies not with this Court, but with Congress.

[33] Indeed, even New York's Tax Commissioner candidly conceded the point before the State legislature which ultimately refused to endorse the scheme presently before the Court: "Despite the fact that New York once sought a specific Congressional delegation of authority over Indians and Indian reservations, Congress has not given such authority. New York's general civil laws—including its tax laws—are not . . . applicable to tribe members on reservations." Hearings on N.Y. Senate Bill S7988 (May 2, 1992) (Statement of James W. Wetzler).

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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